RECORD AND BRIEFS

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Nos. 10-1542 and 10-1543

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL
Petitioner,

v.

CARLOS MARTINEZ GUTIERREZ,
Respondent.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
Petitioner,

v.

DAMIEN ANTONIO SAWYERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRATION JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Heartland Alliance's **National Immigrant Justice Center** (NIJC) is a non-profit organization headquartered in Chicago, Illinois. NIJC has been accredited by the Board of Immigration Appeals ("BIA") since 1980. NIJC provides education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2010, though its staff attorneys and its network of over 1000 *pro bono* attorneys, NIJC provided legal services to more than 10,000 non-citizens.

NIJC promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. NIJC has a deep interest in the fairness of the BIA review process, as well as in protecting the opportunity of noncitizens like the Petitioners to seek discretionary relief from removal.

SUMMARY OF THE ARGUMENT

Lurking below the prominently argued questions of statutory interpretation in this case are complicated questions of how deference to the Board of Immigration Appeals ("Board") ought to function.

The Ninth Circuit analyzed the question below under the familiar *Chevron* test, as elaborated on by this Court's decision in *National Cable & Telecommunications Associations* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842–43 (1984). However,

this aspect of the lower court's approach was erroneous. The published Board decisions which the lower court analyzed under *Chevron* engaged in a straightforward "plain language" analysis of § 1229b(a) (1) and (2). Under this Court's decision in *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009), agency decisions are not entitled to *Chevron* deference where they erroneously reach a plain meaning statutory interpretation and a court finds the statutory text ambiguous. The Board has not purported to choose one interpretation over other plausible choices; indeed, the Board's previous case law provides some reason to believe that it might adopt the imputation rule urged by Respondents. As the BIA offered no rationale for the result other than a plain language reading, the Court's case law calls for remand if the Court finds the statutory provisions ambiguous.

If the Court were to find that the Board's precedential decision-making qualified for *Chevron* deference, it would then confront a novel circumstance of an administrative law court purporting to overturn an Article III court under the authority of *Brand X*. *Amicus* submits that *Brand X* is particularly problematic as to administrative law bodies such as the Board. While *Brand X* deference always entails some separation of powers questions, those tensions are heightened in the immigration context, where the executive has a role distinct from the legislative, and where the Constitution places immigration matters squarely in the hands of Congress. Worse, the institutional integrity of the federal court system is implicated when the power to overrule Article III courts is given to administrative law judges. Amicus would urge against *Brand X* deference for agencies such as the Board.

To the extent that the Court concludes that *Brand X* necessarily follows from *Chevron* deference to the Board, the Court should revisit whether *Chevron* deference is appropriate as to the Board of Immigration Appeals in the first place. The Board occupies an unusual role within the administrative law world. It does not operate openly; it maintains no public docket, rarely invites outside participation before issuing precedential decisions, and does not even make its rare oral arguments publicly known. It operates in a dual-enforcement context wherein it possesses no rulemaking authority of its own, does not itself enforce the immigration laws, and possesses no authority to overrule regulations promulgated by other related agencies. It suffers from a lack of resources which has led to a slew of poorly reasoned published and unpublished decisions. It decides nearly 40,000 cases per year, selecting approximately 0.1% of those cases for publication. Its criteria for publication are not publicly revealed. It is often called upon to interpret provisions of the Immigration and Nationality Act which the federal courts are simultaneously forced to interpret in the criminal context. If the Court were to revisit the propriety of the appropriate style of deference to the Board, Amicus submits that the *Chevron* framework would be inappropriate.

ARGUMENT

I. SHOULD THE COURT FIND THE STATUTORY LANGUAGE AMBIGUOUS, A REMAND IS NECESSARY BECAUSE BIA HAS NOT SET FORTH A RATIONALE THAT WOULD INVOKE DEFERENCE

The parties urge that the statutes in question have a plain meaning under "step one" of *Chevron U.S.A.*

Inc. v. *NRDC*, 467 U.S. 837, 842–43 (1984), after application of traditional canons of construction. Cf. Br. for Pet'r, 33; Br. for Resp't, 37 (10-1543). The Board of Immigration Appeals also ruled on plain meaning grounds. When the Board found that a parent's period of residence cannot be imputed to a child for the purpose of satisfying the eligibility requirements contained in 8 U.S.C. § 1229b(a)(1) and (2), it did so based on the "clear language of the statute" and the "clear intent of Congress." *In re Escobar*, 24 I. & N. Dec. 231, 234 (2007) (interpreting § 1229b(a)(1)); see also *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (BIA 2008) (relying on *Escobar* and interpreting § 1229b(a)(2)). The Board believed its interpretation was compelled by the statute's plain meaning, and conducted a typical step one analysis. See, *e.g.*, *In re Martinez*, 25 I. & N. Dec. 66, 74-75 (BIA 2009) ("In ascertaining the plain meaning of a statute, we consider the particular statutory language at issue, its context, and the language and design of the statute as a whole."

If the Court reaches the question of deference under *Chevron*, it will have already determined that the statute is ambiguous—that it lacks a plain meaning. See *Chevron*, 467 U.S. at 842–43 (instructing courts to defer to reasonable agency interpretations only when the intent of Congress is not clear or unambiguous). Thus, in order for the Court to reach the second "step" of *Chevron*, it must implicitly recognize that the stated basis for the Board's ruling in *Ramirez-Vargas* was erroneous.

It is no answer to say that the Board's "refusal" to read imputation into the statute would have been reasonable under *Chevron* if the Board *had* attempted to construe an ambiguous statute. Cf. Br. or Pet'r at 34. The Board did not simply decline to

exercise its discretion to read imputation into the statute; instead, the Board believed it lacked such discretion in the first instance.

Even if the Board's interpretation would have been permissible had it found the statute to be ambiguous, it is a "simple but fundamental rule of administrative law" that courts can "judge the propriety" of agency action "solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Application of this administrative law rule is particularly sensible here, where the Board's case law gives some reason to believe that the agency might permit imputation from parent to child if it believed that the statutory text could support that approach. See, *e.g.*, *In re Ng*, 12 I. & N. Dec. 411, 412 (BIA 1967); *In re A.*, 4 I. & N. Dec. 723, 725 (BIA 1952); cf. *In re Aurelio*, 19 I. & N. Dec. 458 (BIA 1987) (imputing intent of parents to child).

Amicus understands the Court to have adopted a rule that "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Peter Pan Bus Lines, Inc.* v. *Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (citations and internal quotation marks omitted). In *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009), the Court quoted with approval the holding in *Cajun Elec. Power Coop., Inc.* v. *F.E.R.C.*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (opinion by Silberman, J., joined by R. Ginsburg and Thomas, JJ.), that "if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see." The *Negusie* Court quoted that language for the proposition that deciding a matter unaddressed by

the Board of Immigration Appeals would be "in tension with" the ordinary remand rule. 555 U.S. at 523. As that proposition was the basis for the Court's decision, cf *id.* at 534 n.5 (Stevens, J., concurring in part and dissenting in part), it constitutes part of the holding of that case.

Thus, to the extent that the Court finds it necessary to reach step two of *Chevron*, *Negusie* requires application of the "ordinary remand rule" so that to the Board may exercise its discretion in the first instance. 555 U.S. at 523 ("Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." (citations and internal quotation marks omitted)); see also *INS* v. *Orlando Ventura*, 537 U.S. 12, 17 (2002) (*per curiam*) (explaining that the ordinary remand rule applies where an agency "can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides").

If the Court finds the statutory texts at issue herein to lack a plain meaning, the Court would then confront the issue of the Board's authority under Brand X. While the Court need not resolve the question today, it will likely arise on remand, and the Court may find it prudent to provide some guidance to the lower courts on this point.

II. THE COURT OUGHT TO HESITATE BEFORE APPLYING *BRAND X* TO THE BOARD OF IMMIGRATION APPEALS

The Court's decision in *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005), appears to permit agencies to overturn or reject statutory interpretations adopted by the federal courts, when the agencies issue decisions which carry the force of law. *See id.* at 1017 (Scalia, dissenting). Indeed, the Board has so interpreted *Brand X*, having cited it in dozens of cases, and employed it in published[1] and unpublished cases[2] to reject federal court decisions in cases arising within those circuits.

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[1] *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008) (rejecting *Lin* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) within the Ninth Circuit); *In re Silva-Trevino*, 24 I. & N. Dec. 687 (BIA 2008) (overturning 50 decades of BIA jurisprudence and case law of ten circuits); *In re Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010) (rejecting *Acosta* v. *Gonzales*, 439 F.3d 550 (9th Cir. 2006) within Ninth Circuit); *In re Guevara Alfaro*, 25 I. & N. Dec. 417 (BIA 2011) (rejecting *Quintero-Salazar* v. *Keisler*, 506 F.3d 688 (9th Cir. 2007) under authority of *Silva-Trevino*, notwithstanding intervening circuit authority from Eighth and Third Circuits rejecting the analysis in that decision); *In re Saiful Islam*, 25 I. & N. Dec. 637 (BIA 2011) (refusing to apply *Nason* v. *INS*, 394 F.2d 223 (2d Cir. 1968) within the Second Circuit).

[2] *See In re Benito Estrada*, File: A092 408 863, 2008 WL 5025206 (BIA Oct. 27, 2008) (unpublished) (rejecting *Lin* v. *Gonzales*, *supra*, within Ninth Circuit); *In re Juan Manuel Alvarez-Briseno*, File: A021 611 209, 2009 WL 773178 (BIA Feb. 27, 2009) (unpublished) (same); *In re Jesus Haro-Perez a.k.a. Jesus Jose Harro*, File: A092 515 273, 2009 WL 2171613 (BIA July 9, 2009) (unpublished) (same); *In re Ruben Dario Sanchez Esquivel a.k.a. Ruben Dario Sanchez-Equivel a.k.a. Ruben Dario*, File: A035 727 884, 2009 WL 3250485 (BIA Sept. 18, 2009) (unpublished) (same); *In re Gilberto Salgado-Valenzuela*,

Further, the agency has openly adopted a policy of employing *Brand X* widely, in order to assert executive authority:

> The Supreme Court's decision in Brand X Internet offers **an important opportunity** for the Attorney General and the Board to be able to reclaim Chevron deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations.

Board of Immigration Appeals: *Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*, 73 Fed. Reg. 34,654, 34,661 (June 18, 2008) (emphasis added) (cited with approval in *In re R-A-*, 24 I. & N. Dec. 629 (BIA 2008).

File: A041 392 297, 2009 WL 4030445 (BIA Nov. 10, 2009) (unpublished) (same); *In re: Aik Wong a.k.a. Bingqin Wang*, File: A098 270 087, 2010 WL 3027539 (BIA July 2, 2010) (unpublished) (same, notwithstanding intervening decision in *Coyt* v. *Holder*, 593 F.3d 902 (9th Cir. 2010), which the Board found inapplicable); *In re Oscar Padilla*, File: A073 868 045, 2008 WL 5477687 (BIA Dec. 8, 2008) (unpublished) (rejecting *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005) within Ninth Circuit); *In re Karina J. Alvarez-Fernandez a.k.a. Karina J. Alvarez*, File: A046 941 394, 2009 WL 638928 (BIA Feb. 24, 2009) (unpublished) (applying *Silva-Trevino* within 11th Cir.); *In re Agustin Gandai Ajavon*, File: A028 202 026, 2009 WL 1799957 (BIA May 29, 2009) (unpublished) (applying *Silva-Trevino* within Third Circuit, notwithstanding *Mehboob* v. *Att'y Gen.*, 549 F.3d 272 (3d Cir. 2008)); *In re Jorge Alberto Mora-Saucedo a.k.a. George Albert Saucedo a.k.a. Georget A. Saucedo a.k.a. George Alberto Mora-Saucedo*, File: A305 933 369, 2010 WL 1607035 (BIA March 29, 2010) (unpublished) (applying *Silva-Trevino* within Ninth Circuit notwithstanding *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 910 (9th Cir. 2009)).

The unpublished Board decision in *Sawyers*, below, File: A44 852 478, 2007 WL 4711443 (BIA Dec. 26, 2007), appears to be the first decision in which Board employed *Brand X* to reject a federal court decision for a case arising within that circuit.

The impact of this new, muscular policy has been significant. When the Board rejects heretofore binding circuit authority, it leads to increased federal court litigation. For instance, in *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008), the Board declined to apply *Lin* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) within the Ninth Circuit. The Board's interpretation of its regulations was rejected in court after court,[3] but the developing weight of contrary authority left the Board unconvinced.[4] The Ninth Circuit ultimately rejected the Board's position again, *Reyes–Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011), but not before the Board had disclaimed authority to reopen proceedings in numerous unpublished decisions.[5] The Westlaw database is not

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[3] *William* v. *Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007); *Marin–Rodriguez* v. *Holder*, 612 F.3d 591, 594–95 (7th Cir. 2010); *Coyt*, 593 F.3d 902; *Pruidze* v. *Holder*, 632 F.3d 234, 237–38 (6th Cir. 2011); *Luna* v. *Holder*, 637 F.3d 85 (2d Cir. 2011); *Reyes–Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Prestol Espinal* v. *Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011).

[4] *See In re: Aik Wong a.k.a. Bingqin Wang*, 2010 WL 3027539 (unpublished) (finding the Ninth Circuit's intervening authority in *Coyt*, 593 F.3d 902 to be distinguishable).

[5] *See In re Benito Estrada*, 2008 WL 5025206 (unpublished); *In re Juan Manuel Alvarez-Briseno*, 2009 WL 773178 (unpublished) (same); *In re Jesus Haro-Perez a.k.a. Jesus Jose Harro*, 2009 WL 2171613 (unpublished) (same); *In re Ruben Dario Sanchez Esquivel a.k.a. Ruben Dario Sanchez-Equivel a.k.a. Ruben Dario*, 2009 WL 3250485 (unpublished) (same); *In re Gilberto Salgado-Valenzuela*, 2009 WL 4030445

a comprehensive list of Board decisions; and it is unknown how many people were prejudiced by the Board's approach. Many noncitizens are financially unable to engage in the appellate litigation which would be necessary to vindicate the precedent of the court of appeals.

The point is not that the Board is invariably wrong when it disagrees with a Court of Appeals' interpretation; but that the Board's expansive view of *Brand X* has consequences for the federal court system. To take another example, in *Silva-Trevino*, the Attorney General overturned established case law in every circuit except for the Seventh Circuit. See *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008). Therefore, under *Brand X*, the Board applied *Silva-Trevino* within the Third Circuit, *see In re Agustin Gandai Ajavon*, 2009 WL 1799957 (unpublished), even after post-*Silva-Trevino* circuit precedent adhered to the categorical approach. *Mehboob* v. *Att'y Gen.*, 549 F.3d 272 (3d Cir. 2008). The Board's stance required the Third Circuit to re-re-affirm its adherence to the categorical test for ascertaining moral turpitude. *Jean–Louis* v. *Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009); accord, *Guardado–Garcia* v. *Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (adhering to categorical test); *Fajardo* v. *U.S. Atty. Gen.*, 659 F.3d 1303, 1310-11 (11th Cir. 2011) (same, finding *Silva-Trevino* contrary to Congressional intent). It is the nature of *Brand X* in this context to lead to re-litigation of issues seemingly resolved at the Court of Appeals level.

The Board basically shares Justice Scalia's understanding of *Brand X* that "[e]ven when the

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(unpublished) (same); *In re Aik Wong a.k.a. Bingqin Wang*, 2010 WL 3027539 (unpublished).

agency itself is party to the case in which [a] Court construes a statute, the agency will be able to disregard that construction and seek Chevron deference for its contrary construction the next time around." *Brand X*, 545 U.S. at 1017.

Aside from the constitutional issues noted in the *Brand X* dissent, *see id.* (citing *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948)), the approach has particular significance in the immigration context. The constitution gives Congress a leading role in regulating immigration within the United States, U.S. Const. art. I, § 8, cl. 4, see, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 69-70 (1941), but immigration may also implicate national sovereignty, international relations, and defense powers. See, *e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (citing *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893). Permitting executive agencies power to reject the "best interpretation" *Brand X*, 545 U.S. at 983 (Scalia, J, dissenting), of a Congressional statute allows the executive to expand its authority at the expense of Congress. *Brand X* thus threatens the delicate balance between the Congress and the Executive as well as relations between the Judiciaru and the Executive.

At a practical level, application of *Brand X* in this context would allow administrative law judges to effectively overrule courts which have reversed them. The Court need not be blind to the odd psychology this would involve; surely no judge likes being reversed. See, *e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 77-78 (1994) (discussing reasons why district court judges dislike being reversed on appeal); Richard A. Posner, *The*

Problems of Jurisprudence 224 (1990) ("[M]ost judges are highly sensitive to being reversed"). As understood by the agency, *Brand X* permits an administrative law board whose decision has been reversed (as to an ambiguous statute) to overturn the reversal by the issuance of a new precedential decision. This creates at best an untoward appearance. Justice Scalia noted this in *Brand X*, see 545 U.S. at 1016-17 (Scalia, J., dissenting), but the administration action in that case was a highly technical administrative rulemaking, *id.* at 977-78, not in the context of administrative judicial bodies overruling Article III courts. Whatever the wisdom of *Brand X* in heartland areas of administrative action, it has a different mien applied to administrative law bodies.

Unless an agency actually undertakes to overrule a decision of this Court, the *Brand X* issue will be resistant to the Court's review. As in any agency case that comes before the Court, this Court is not bound by the lower court interpretation. *Id.* at 1019-20 (Scalia, dissenting). (This is presumably why the parties have declined to address the *Brand X* issue at any length.) In any agency case that comes to the Court, it will analyze the agency action under the *Chevron* test, and *Brand X* issues would become irrelevant by virtue of the grant of certiorari. The institutional significance of *Brand X* will persist; and this Court's legal interventions must necessarily remain infrequent in comparison to the larger federal docket.

Amicus sees three possibilities: (a) the agency's approach is correct, and the BIA may overrule Article III courts by issuing precedential decisions; (b) the decision in *Brand X* may be interpreted not to apply to quasi-judicial bodies like the BIA (or to the BIA

only, as *sui generis*); or (c) the Court may revisit whether to grant *Chevron* deference to the Board.

III. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER BIA'S ADJUDICATORY DECISIONS WARRANT *CHEVRON* DEFERENCE

The Board's peculiar administrative work does not fit any of the rationales that underlie *Chevron*'s strong deference to agency rulemaking and expertise. Should the Court find *Chevron* deference implicated by this case, *Amicus* urges the Court to rule that *Chevron* deference should not apply to BIA decisions. Given the poor fit between the Board's activities and *Chevron*'s reasoning, only so-called "*Skidmore* deference" should be accorded to the Board's juridical decisions. See *United States* v. *Mead Corp.*, 533 U.S. 218, 239 (2001) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944)).

A. The BIA Generally Makes Rules With No Input From the Public or From Stakeholders.

Unlike federal administrative agencies acting through public rulemaking, cf., *e.g.*, Dep't of Homeland Sec., Statement of Regulatory Priorities, 75 Fed. Reg. 79536-01, 2010 WL 5677733 (Dec. 20, 2010), the Board of Immigration Appeals maintains no public docket. Nothing on its website, or in any other publication, indicates any case or issue which is under consideration for potential publication of a precedential decision. Cf. Executive Office of Immigration Review, http://www.justice.gov/eoir (last visited Dec. 20, 2011).

Even oral argument at the Board is not announced publicly. Cf. Executive Office of Immigration Review, News and Information,

http://www.justice.gov/eoir/press/newsinfo.htm (last visited Dec. 20, 2011) (public statements by EOIR during 2010 and 2011, including no mention of oral argument in any case). Oral argument, at any rate, is quite rare. Since 2008, the Board appears to have scheduled oral argument in only four cases. *In re Bautista*, 25 I. & N. Dec. 616 (BIA 2011); *In re Ramon Roberto Huerta-Flores a.k.a. Roberto Huerta*, File: A092 444 014, 2010 WL 5808899 (BIA Aug. 27, 2010) (unpublished); *In re Castillo-Padilla*, 25 I. & N. Dec. 257 (BIA 2010); *In re Marcal Neto*, 25 I. & N. Dec. 169, 171 (BIA 2010) (argument cancelled due to inability of counsel to be present). During that four year period, the Board and Attorney General issued 141 precedential decisions, and the Board decided at least 104,976 cases. U.S. Dep't of Justice, FY10 Statistical Year Book, at S1 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf (numbers are for fiscal years 2008-2010, the last year for which statistics are available). That is, oral argument occurred in 2.1% of the published decisions and in less than .001% of unpublished decisions.

From 2008 to the present, *amicus curiae* have appeared in 11 of the Board's published decisions (less than 10%). Three of those cases involved the overruling of earlier BIA decisions which had been previously decided without amicus involvement,[6] perhaps suggesting the utility of public involvement. This level of amicus involvement is actually substantially higher than the historical norm. From

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[6] *In re Marcal Neto*, 25 I. & N. Dec. 169 (overruling *In re Perez Vargas*, 23 I. & N. Dec. 829 (BIA 2005)); *In re Garcia Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (overruling *In re Saysana*, 24 I. & N. Dec. 602 (BIA 2008)); *In re Alyajzi*, 25 I. & N. Dec. 397 (BIA 2011) (overruling in part *In re Shanu*, 23 I. & N. Dec. 754 (BIA 2005)).

2002-2006 (during which period 88 precedential decisions were issued), *amicus curiae* were involved in only three published decisions (3.4% of the total). *In re Assaad*, 23 I. & N. Dec. 553 (BIA 2003); *In re Smirko*, 23 I. & N. Dec. 836 (BIA 2005); *In re S-K-*, 23 I. & N. Dec. 936 (BIA 2006). Indeed, during that period, the Board issued as many published decisions in cases involving *pro se* noncitizens[7] as in cases involving *amicus curiae*. *In re Y-C-*, 23 I. & N. Dec. 286 (BIA 2003) (asylum application by unaccompanied minor); *In re Gomez-Gomez*, 23 I. & N. Dec. 522 (BIA 2002) (finding removability of 8 year old respondent established by clear and convincing evidence and remanding for *in absentia* removal order); *In re Mejia-Andino*, 23 I. & N. Dec. 533 (BIA 2002) (concerning propriety of service on minor respondent 7 years of age). In none of the *pro se* published cases – all involving minor respondents – did the Board solicit amicus briefing or appoint counsel.

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[7] In 2003, 48 percent of aliens were unrepresented in proceedings before Immigration Judges. Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook G1, fig. 9. (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. By 2006, that number had decreased to 35 percent; it rose again to 42 percent in 2007. *Id.* The percentage of aliens who were unrepresented in their proceedings before the BIA itself fluctuated between 25 percent in 2007 and 22 percent in 2008. *Id.*; Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook G1, fig. 9, W1, fig. 30 (2008), http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. Noncitizens before the BIA are not considered eligible for appointed counsel. *See In re Compean*, 24 I. & N. Dec. 710, 714 (BIA 2009), *rev'd*, 25 I & N. Dec. 1 (BIA 2009); *cf. Aguilera-Enriquez* v. *INS*, 516 F.2d 565, 570 (6th Cir. 1975) (finding appointed counsel required by Fifth Amendment in limited cases).

Indeed, even in counseled cases, the issues under consideration are often opaque. For instance, in *Silva-Trevino*, former Attorney General Mukasey certified a BIA decision to himself, and then issued a decision which overturned 50 years of BIA case law, as well as case law in nearly every circuit in the country. See *In re Velazquez-Herrera*, 24 I. & N. Dec. at 513 ("For nearly a century, the Federal circuit courts of appeals have held that ... the focus ... must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." (emphasis in original)). The attorney for Mr. Silva-Trevino was not even advised that the case had been certified to the Attorney General until months after the certification. Br. for Pet'r 4-5, *Silva-Trevino* v. *Holder* (5th Cir.) (11-60464) (on file with counsel) (record contains emails to Immigration Court certifying case in April 2007, but notice not sent to counsel until August 2007). Counsel for Silva-Trevino was not permitted to submit briefing, or even told of the issues being considered by the Attorney General. *Jean-Louis*, 582 F.3d at 471 n.11 ("the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. In fact, neither the IJ decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders, including immigrant and refugee advocacy organizations, the opportunity to register their views.").

Granted, *amicus* briefs are only one way for the public to be involved in a case, and are uncommon even at the Courts of Appeals. *Amicus* is not arguing here that agencies must issue statements to parties

or potential amici of issues under consideration. But without some means of permitting public input, such input cannot reasonably be expected. The result is that the precedent-setting rules of the Board and Attorney General are as far from traditional notice and comment rulemaking or public agency hearings as can be imagined. Cf. *Mead Corp.*, 533 U.S. at 230 ("fairness and deliberation ... should underlie a pronouncement [having the force of law]").

B. The BIA Has Comparatively Limited Subject Matter Expertise.

Although the subject matter jurisdiction of the BIA is limited,[8] its adjudicatory nature gives it little advantage over Article III courts, and the split enforcement structure also undercuts any claim for deference.

The DHS and BIA are distinct administrative bodies that implement immigration policy in a split-enforcement structure.[9] The BIA is located within the Department of Justice's Executive Office for Immigration Review (EOIR), where immigration judges adjudicate removal cases.[10] In this split-

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[8] *See* Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(b) (2009) (setting forth the limited nature of the BIA's subject matter jurisdiction).

[9] *See generally* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315, 317-319 (1987).

[10] Enforcement by the DHS and BIA differs slightly from typical split-enforcement agency structures because the Secretary of Homeland Security and the Chairman (or a majority of the Board) may refer cases to the Attorney General, or the Attorney General May direct the BIA to refer cases. 8 C.F.R. § 1003.1(h) (2007). *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja vu of*

enforcement structure, the DHS enforces and administers the law while the BIA adjudicates. This is not unique to immigration law. Cf., *e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678; Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 823; Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

The split enforcement structure militates against giving the Board full *Chevron* deference. In *Martin* v. *Occupational Safety & Health Rev. Comm'n*, (499 U.S. 144 (1991)), the Court held that in a split enforcement structure, the rulemaking enforcement agency had "readily identifiable structural advantages" over the adjudicatory agency. *Id.* at 152.[11] For instance, the Court found the enforcement agency better able to "reconstruct the purpose of the regulations in question," because it promulgated those regulations. *Id.*

The Board adjudicates with regard to a wide variety of matters. For instance, the Board interprets the aggravated felony definition at 8 U.S.C. § 1101(a)(43). See, *e.g.*, *In re Puente*, 22 I. & N. Dec. 1006 (BIA 1999), *rev'd*, *In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002). So do District Courts throughout the country, because it is relevant to sentencing of individuals convicted of Illegal Reentry under 8 U.S.C. § 1326, U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) (2010); those decisions may be directly appealed to the Courts of Appeals. See, *e.g.*, *United States* v. *Chapa-Garza*, 243 F.3d 921, 926 (5th Cir.

Decisional Disparities in Agency Adjudication, 60 Stan. L. Rev. 475, 484 (2007).

[11] The Court in *Martin* presumed "that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." *Martin*, 499 U.S. at 152.

2001). Illegal Reentry is one of the most common convictions in the federal criminal system, accounting for thousands of convictions annually. TRAC Immigration, Illegal Reentry Becomes Top Federal Charge (June 10, 2011), http://trac.syr.edu/immigration/reports/251/. The Board appears to have no structural advantage over the federal courts in interpreting the aggravated felony statute. Yet the aggravated felony definition is within the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), and some circuits have granted deference to Board interpretations of those provisions, see, *e.g.*, *Restrepo* v. *Att'y Gen. of U.S.*, 617 F.3d 787 (3d Cir. 2010), decisions which thereafter define the scope of federal criminal sentences. See *United States* v. *Ascencion-Carrera*, 413 F. App'x 549 (3d Cir. 2011) (applying Restrepo's holding on sentencing appeal).

The Board adjudicates asylum applications; so does USCIS's Asylum Office, a specialized group of adjudicators trained specifically in the handling of asylum cases and as to techniques for interviewing asylum claimants. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 311, 381 (2007) ("[E]very new asylum officer completes an intensive five-week basic training course with testing. Each week, every regional office conducts four hours of training on new legal issues, country conditions, procedures, and other relevant matters.... [A]sylum officers currently receive much more initial and ongoing training than the immigration judges.").

The Board makes decisions regarding admissibility under 8 U.S.C. § 1182, in the course of adjudicating Adjustment of Status applications. See, *e.g.*, *In re*

Lemus-Losa, 24 I. & N. Dec. 373 (BIA 2007). The precise number of Adjustment cases adjudicated by the Board is not publicly available, but in FY2010, the Immigration Courts (of whose decisions a limited number are appealed to the Board) granted 8,475 applications for Adjustment of Status. U.S. Dep't of Justice, FY10 Statistical Year Book, at R3 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. By contrast, USCIS approved over 550,000 applications for Adjustment of Status and adjudicated more than 35,000 applications for waivers of inadmissibility.[12] The Secretary of State adjudicated 6.5 million visas in fiscal year 2010.[13] These numbers dwarf the numbers of cases handled by the Board.

The Board's powers vis-à-vis regulations also highlights the Board's limited role. The Board of Immigration Appeals does not itself issue regulations, but rather, considers itself to be bound by regulations. *In re Moreno-Escobosa*, 25 I. & N. Dec. 114 (BIA 2009); *In re Ponce De Leon*, 21 I. & N. Dec. 154, 158 (BIA 1996) ("A regulation ... has the force

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[12] *See* Randall Monger and James Yankay, Annual Flow Report, March 2011: U.S. Legal Permanent Residents: 2010, at 2, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf; U.S. Dep't of Homeland Sec., Office of Citizenship and Immigration Services Ombudsman, Waivers of Inadmissibility: Additional Improvements Needed to Enhance the Current Filing Process and Minimize Reluctance to File at 8, Table D (June 10, 2010), *available at* http://www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf.

[13] *See* U.S. State Dep't, Report of the Visa Office 2010, Table I, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2006-2010, *available at* http://www.travel.state.gov/visa/statistics/statistics_5240.html.

and effect of law as to this Board and Immigration Judges."). Regulations may be promulgated by the Attorney General or by sister agencies. See, *e.g.*, 8 C.F.R. § 103.7(b)(1) (setting application fees for *inter alia*, applications for Adjustment of Status).

In short, Congress has given the Attorney General controlling authority over the interpretation of the immigration laws, 8 U.S.C. § 1103(a)(1), but the Board exercises that authority on the basis of subject matter expertise which is not unique or particularly extensive. The current structural nature of the Board would support a more limited form of deference than *Chevron* deference.

C. The BIA Lacks the Resources to Adequately Provide Legal Guidance on Issues Affecting Thousands.

Immigration law is often said to be "second only to the Internal Revenue Code in complexity." *Baltazar-Alcazar* v. *INS*, 386 F.3d 940, 948 (9th Cir. 2004). Yet the resources given the Board are incommensurate with its responsibility to interpret those provisions, particularly given their import to many millions of individuals.

For example, in 2007, the Board's eleven members completed 35,393 appeals, amounting to approximately 136 appellate decisions—over 12 per member—per workday.[14] In 2008, the number of appeals increased by over eight percent, to 38,369. *Id.* Even if the Board had the maximum number of members allowed at the time (fifteen), each member

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[14] *See* Darren H. Weiss, Comment, *X Misses the Spot: Fernandez v. Keisler and the (Mis)appropriation of Brand X by the Board of Immigration Appeals*, 17 Geo. Mason L. Rev. 889, 917–18 (2010) (citing BIA sources).

would have been responsible for authoring over ten appeal decisions *per day*. *Id.*; Cf. *Mead Corp.*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

It is not surprising, when Board members can devote only between seven and ten minutes to each case, that the Board has repeatedly issued flawed decisions. See, *e.g.*, *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (noting that in the year ending September 23, 2005, the Seventh Circuit "reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits."). As Judge Posner has stated, the BIA's failures "can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate." *Kadia* v. *Gonzales*, 501 F.3d 817, 821 (7th Cir.2007).

Examples of the BIA's failure to observe even "elementary principles of adjudication" litter the Federal Reporter. *Niam* v. *Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (listing erroneous BIA decisions from the Second, Seventh, Eighth, and Ninth Circuits); see, *e.g.*, *Sosnovskaia* v. *Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("the procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard"); *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005) (the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment,

personal speculation, bias, and conjecture"); *Wang* v. *Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding"). It has made fatal mistakes when addressing facts. *E.g. Soumahoro* v. *Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (the immigration judge's factual conclusion is "totally unsupported by the record"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (the immigration judge's "very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Chen* v. *U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (the immigration judge's finding is "grounded solely on speculation and conjecture"). These decisions are illustrative of a much larger number of examples suggesting problems within the BIA.

The stakes in these cases are often of the highest order. The instant cases, not atypically, involve permanent exile from family, friends, longstanding residence, and employment. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (removal "may result . . . in loss of both property and life, or of all that makes life worth living"). Asylum cases involve stakes no less significant, as erroneous denial could lead to torture, persecution, or death. *Uanreroro* v. *Gonzales*, 443 F.3d 1197, 1208 (10th Cir. 2006). Judicial review over individual immigration case determinations is often severely restricted, see, *e.g.*, 8 U.S.C. §§ 1252(a)(2)(B), (a)(2)(C), leaving the courts unable to remedy injustices flowing from statutory misinterpretations. In this context, the importance of a fair reading of the laws can hardly be understated.

D. In *Aguirre-Aguirre*, the Court Was Not Presented With Arguments Against *Chevron* Deference, and That Decision Pre-Dates *Mead*.

When the Court decided *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), the Court was not presented with any substantive arguments against application of the *Chevron* regime to the Board's decisions in immigration cases. Cf. Br. for the Resp't, No. 97-1754, 1999 WL 26721, at *29 (U.S. Jan. 21, 1999); Br. Amicus Curiae of the Lawyers Comm. for Human Rights in Support of the Resp't, No. 97-1754, 1999 WL 23657 (U.S. Jan. 21, 1999); Brief for Amicus Curiae in Support of the Resp't, No, 97-1754, 1999 WL 26718 (Jan. 21, 1999). The only arguments raised in that case were whether the lower court's analysis was consistent with Chevron. See Br. for the Resp't, 1999 WL 26721, at *29-30.

While the Court has described the application of Chevron as "well settled," *Negusie*, 555 U.S. at 516, *Aguirre-Aguirre* is of fairly recent vintage, and predates the Court's decision in *Mead Corp.*, 533 U.S. at 236. *Arobelidze* v. *Holder*, 653 F.3d 513, 520 (7th Cir. 2011). While several decisions of this Court have relied *Aguirre-Aguirre* and *Chevron*, the precise level of deference was rarely decisive. See, *e.g.*, *Judulang* v. *Holder*, No. 10-694, 2011 WL 6141311, at *7 n.7 (U.S. Dec. 12, 2011) (finding no effective difference between review under *Chevron* and under the Administrative Procedures Act). Reconsideration would be appropriate at some point; and this case may present an appropriate vehicle.

Adopting a lesser form of deference to the Board would not resolve the adjudicatory problems of the Board, but it would avoid the embarrassment to the system which would be entailed when the federal

courts may be overruled by an administrative law board, on the basis of hasty work, without public exposure, on the basis of limited expertise, and with gravely insufficient resources.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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